IN THE SUPREME COURT OF MICHIGAN

ADM File No. 2003-47

IN RE: ADMINISTRATIVE ORDER NO. 2006-6 (AUGUST 9, 2006) PROHIBITING THE "BUNDLING" OF ASBESTOS-RELATED CASES

COMMENTS OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF ADMINISTRATIVE ORDER NO. 2006-6 (AUGUST 9, 2006) PROHIBITING THE "BUNDLING" OF ASBESTOS-RELATED CASES

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INTRODUCTION

The Washington Legal Foundation hereby submits these comments strongly supporting the continued implementation of this Court's Administrative Order No. 2006-6 (Aug. 9, 2006) (the "Order") prohibiting the "bundling" and consolidation of asbestos-related cases for settlement or trial, except for purposes of discovery. The Order is an eminently practical and fair procedural means for dealing with the "elephantine mass" of asbestos-related suits that have inundated courts in Michigan and other states in recent years, the overwhelming majority of which involve claimants who have no present impairment or injury and may never become sick from asbestos exposure. Accordingly, cases will henceforth be settled or tried on their individual merit, and no longer will serious claims be allowed to leverage settlements in less serious cases.

INTERESTS OF THE WASHINGTON LEGAL FOUNDATION

The Washington Legal Foundation (WLF) is a national, non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide, including many in Michigan. Founded in 1977, WLF devotes substantial resources to promoting civil justice reform through WLF's Litigation and Legal Studies Divisions as well as through its Civic Communications Program.

In particular, WLF has participated in asbestos-related cases urging the courts to take steps to restore public confidence in the administration of justice. *See, e.g., In re: Kensington Int'l Ltd*, 368 F.3d 289 (3d Cir. 2004) (recusal of judge overseeing bankruptcy proceedings of Owens Corning); *In re Congoleum Corp*., No. 03-51524 (KFC) (D.N.J.) (on remand from the Third Circuit, 426 F.3d 675 (3d Cir. 2005)) (urging district court to uphold disgorgement of attorney's fees as sanction by bankruptcy court of law firm for conflict of interest in representing 80,000 asbestos claims while representing company in bankruptcy because of

asbestos liabilities). WLF has also published policy papers in this area of the law. *See, e.g.*, Margaret Oertling Cupples, *Mississippi High Court Provides Clear Guidance On Mass Torts Through Asbestos Ruling* (WLF Legal Backgrounder, Apr. 22, 2005); John S. Stadler, *Bilked Asbestos Plaintiffs Sue Florida Bar Association* (WLF Counsel's Advisory, May 19, 2006); Mark A. Behrens and Frank Cruz-Alverez, *State-Based Reforms: Making A Difference In Asbestos and Silica Cases* (WLF Legal Opinion Letter, Aug. 4, 2006).

More pertinently, WLF joined with the Coalition for Litigation Justice, Inc., and other organizations and filed comments on May 26, 2006, supporting this Court's February 23, 2006 proposal to prioritize asbestos trials based on two medical criteria-based alternatives where the plaintiffs are unimpaired. While WLF continues to support the establishment of an inactive asbestos docket for unimpaired plaintiffs, the Court's current order prohibiting the "bundling" of asbestos-related cases is in the public interest and promotes the administration of justice.

I. THE BUNDLING OF ASBESTOS-RELATED CASES ENCOURAGES THE FILING OF CLAIMS BY UNIMPAIRED PLAINTIFFS

The wave of unimpaired, asymptomatic asbestos claims filings[1] was precipitated in large part by some courts' bending or ignoring of traditional rules of civil procedure to allow consolidation and aggregation of hundreds, and in some instances thousands, of asbestos claims for settlement and trial purposes. Although those courts by so acting intended to reduce the large overhang of asbestos cases on their dockets, such consolidations have had the

[1] *See Ortiz v. Fiberboard Corp.*, 527 U.S. 815, 821 (1999); *In Re Asbestos Prod. Liab. Litig.* (No. VI), 1996 WL 539589, at *1 (stating that "only a small percentage of the [asbestos] cases filed have serious asbestos-related afflictions"); James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S. C. L. Rev. 815, 823 (2002); American Thoracic Society, *Diagnosis and Initial Management of Nonmalignant Diseases Related to Asbestos*, Am. Jour. Resp. & Crit. Care Med. 2004; 170: 691-715 (noting that "In work sites around the world that meet recommended [industrial hygiene] control levels, high exposure to asbestos is now uncommon and clinical asbestosis is becoming a less severe disease that manifests itself after a long latent interval.").

unintended opposite effect of encouraging the filing of even more unimpaired asbestos-related claims, resulting in an overall net increase of asbestos cases on the courts' docket.[2]

The courts in several jurisdictions have recently recognized how trial consolidations and aggregations in mass tort cases have served both to encourage the filing of marginal, unimpaired claims and to deprive defendants of any meaningful opportunity to defend and test the legitimacy of each claim.[3] In now barring the bundling and consolidation of asbestos suits for trial and settlement, the Michigan Supreme Court has recognized the importance of allowing the Michigan courts and the litigants to examine asbestos claims on their individual merits. Individualized attention to each asbestos claim will serve as a strong deterrent to the filing of unimpaired claims and, most important, will permit those plaintiffs with medically confirmed serious asbestos-related injuries to have their claims resolved much sooner than under the prior liberal consolidation/aggregation system and for a value appropriate to their particularized circumstances.[4]

II. THE COURT'S ANTI-BUNDLING ORDER ADVANCES THE INTERESTS OF JUSTICE FOR ALL LITIGANTS

The Order is an efficient tool for advancing the interests of justice for all litigants in

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[2] *See* Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595, 606 (1997) (noting that judges who have allowed consolidations and aggregation of asbestos and other mass tort claims "create the opportunity for new filings….If you build a superhighway, there will be a traffic jam.").

[3] *See Harold's Auto Parts, Inc. v. Mangialardi*, 889 So. 2d 493, 495 (Miss. 2004) (deeming consolidation by trial court of 264 plaintiffs alleging asbestos exposure from products of 137 defendants "a perversion of the judicial system"); Ohio R. Civ. P. 42 (A)(2) (Ohio Supreme Court amended the Ohio Rules of Civil Procedure to make clear that "For purposes of trial, the court may consolidate pending actions only with the consent of the parties.").

[4] The filing of thousands of unimpaired asbestos claims has been the principal factor driving some eighty-five companies to declare bankruptcy, which bankruptcies have significantly imperiled the chances of present and future claimants with serious asbestos-related diseases to receive just compensation for their injuries. *See* Mark D. Plevin, Paul W. Kalish and Leslie A. Epley, *Where Are They Now, Part Three: A Continuing History of the Companies That Have Sought Bankruptcy Protection Due to Asbestos Claims*, Mealeys' Asbestos Bankruptcy Report, Vol. 4, No. 4 at 1 (Nov. 2005).

asbestos cases in two very significant ways. First, the Order insures that asbestos-related claims, many of which have been generated by mass x-ray screenings conducted in portable medical vans and trailers in shopping malls and union halls, will be scrutinized to determine whether each claim in fact has medical and scientific legitimacy.[5] Since individual attention will now be given to each asbestos case, the parties and the court will have a greater opportunity to ferret out and expose fraudulent and "retread" claims which, unfortunately, have become far too common a feature of mass tort litigation in recent years.[6] Clearly, there is no need for any further study and analysis to confirm that trial consolidations, claim aggregations, verdict samplings and "extrapolations" significantly prejudice defendants' due process rights. Indeed, asbestos litigation is a very mature mass tort and the experience of more than three decades of this litigation has amply demonstrated that such procedural short-cuts wreak havoc with due process and create serious constitutional issues.[7]

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[5] *See In re Joint E. & S. Dists. Asbestos Litig.*, 237 F. Supp. 297, 309 (E.D.N.Y. & S.D.N.Y. 2002); *Eagle-Picher Indus. Inc. v. Am. Employers' Ins. Co.*, 718 F. Supp. 1053, 1057 (D. Mass. 1989); Roger Parloff, *Mass Tort Medicine Men*, THE AMERICAN LAWYER, Jan. 2003 at 98 (noting that audits conducted by the Manville asbestos bankruptcy trust of physician x-ray reports submitted by persons who participated in mass screenings showed that a substantial number of those screened were misdiagnosed as having an asbestos-related lung injury).

[6] *See In Re Silica Products Liability Litig.*, 2005 WL 1593936 (S.D. Tex.) (finding that "phantom epidemic" of silicosis injury claims were "manufactured for money", generated by a litigation-driven screening process featuring 1) attorneys or screening companies running advertisements in local newspapers promising free x-rays, 2) mobile x-ray screeners ignoring proper safety or medical examination standards and reaping significant financial rewards from plaintiff law firms for rendering positive diagnosis of silicosis, and 3) doctors providing "scientifically virtually impossible" diagnoses of silicosis for plaintiffs for whom they previously diagnosed asbestos-related injuries *based on the same x-ray films*). One of the unfortunate but least publicized effects of mass litigation screenings is that many persons participating in the screenings may become unnecessarily alarmed when told they have a serious asbestos-related illness when no such condition exists. *See Beware the B-Readers*, Wall. S. J., Jan. 23, 2006, at A14.

[7] *See Cimino v. Raymark Indus.*, 151 F. 3d 297, 319 (5th Cir. 1998) (vacating trial court's plan for trying consolidated asbestos cases on grounds, among other things, that plan did not permit resolution of issues as causation and damages from the standpoint of individual plaintiffs, but rather from a "group" perspective); *Malcolm v. National Gypsum Co.*, 995 F. 2d 346, 350-353 (2d Cir. 1993) (disapproving consolidation for trial of forty-eight asbestos cases because too many different exposures, crafts, worksites and diseases involved).

Second, as noted by Justice Markham in concurring on the issuance of the Order, the Order will prevent the seriously injured claimants from being used by plaintiff's counsel to leverage and extract settlement payments also for the unimpaired and asymptomatic claimants in counsel's case inventory. Leveraging the relatively small numbers of claimants with current serious injuries to secure payments for thousands of non-sick claimants in a plaintiff counsel's inventory is patently disadvantageous to the seriously injured persons. Because settlement payments are required to be made to the non-sick claimants, these leveraging tactics have depleted or in some cases exhausted the funds available from defendants and their insurers to compensate other persons with serious asbestos-related injuries who later file claims. Leveraging the claims of some clients with those of others in aggregate inventory settlements may very well put plaintiff's counsel in conflict with their clients' interests and, possibly, in breach of their fiduciary duties to those clients.[8]

CONCLUSION

WLF supports continued implementation of the Order because it improves the judicial administration of asbestos-related claims by giving the Michigan courts and the litigants the opportunity to use their limited resources both to examine the individual merits and legal

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[8] *See Huber v. Taylor*, 2006 U.S. App. LEXIS 27088 (3d Cir., October 31, 2006) (vacating summary judgment entered by district court in favor of plaintiff's counsel on claims against them by former clients with asbestos-related injuries who alleged that counsel had breached their fiduciary duty in negotiating mass aggregate settlement that, as a means of maximizing plaintiff counsel's share of contingency fees, provided for greater payments to those of clients who resided in Southern states to the detriment to clients who resided in Northern states; rejecting as "inconceivable" and "preposterous" the assertion by plaintiff's counsel that, because they served only as "co-counsel" to the Northern plaintiffs, they did not owe them any fiduciary duty in negotiating the aggregate settlement; and holding that the plaintiff counsel had an ethical obligation to give both the Northern and Southern clients "full and meaningful disclosure of conflicts of interest" and that the fiduciary duty that an attorney owes clients "…may not be dispensed with or modified simply for the conveniences and economies of class actions….Even when clients are viewed as mere 'inventory', they are still owed the renowned 'punctilio of an honor the most sensitive.'", *quoting* Justice Cardozo in *Meinhard v. Salmon*, 249 N.Y. 458, 464 (N.Y. 1928)).

sufficiency of claims brought by presently injured plaintiffs and then to resolve those meritorious claims. By barring consolidation and aggregation of asbestos-related claims for trial, the Order also deters the filing in Michigan of asymptomatic, unimpaired claims. Such claims have been brought by the tens of thousands nationally and have made it extremely difficult for the courts to give prompt and due consideration to the claims of the seriously injured. The Order is a very good step towards restoring fundamental concepts of due process in mass tort litigation.

Respectfully submitted,

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